

Rampmaier-Verdon v Genovesi
2025 NY Slip Op 35639(U)
January 8, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 611580/2021
Judge: Frank A. Tinari
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 611580/2021SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY**PRESENT:**Hon. FRANK A. TINARI
Acting Justice Supreme CourtMOTION DATE 1/16/24
ADJ. DATE 8/20/24
Mot. Seq. # 002 MotD-----X
DEBRA RAMPMAIER-VERDON, as
Executor of the Estate of JOAN CHAPMAN,
deceased,

Plaintiff,

- against -

MARK GENOVESI, M.D., SCOTT
CAPUSTIN, M.D., CHARLES BLEECHER,
M.D., CHRISTOPHER RUBINO, PA,
GWENDOLYN ARTIS, RN, CRISTINA
DRUMM, NP and ST. CHARLES HOSPITAL,Defendants.
-----XDELL & DEAN, PLLC
Attorneys for Plaintiff
1225 Franklin Avenue, Suite 360
Garden City, New York 11530BARKER PATTERSON NICHOLS, LLP
Attorneys for Defendants Scott Capustin, M.D.,
Christopher Rubino, PA, Gwendolyn Artis, RN, and
St. Charles Hospital
115 E. Stevens Avenue, Suite 206
Valhalla, New York 10595RUBIN PATERNITI GONZALEZ RIZZO
KAUFMAN, LLP
Attorneys for Defendant Cristina Drumm, NP
1225 Franklin Avenue, Suite 200
Garden City, New York 11530

Upon the following papers read on this motion to reargue/renew: Notice of Motion/ Order to Show Cause and supporting papers by defendants, filed December 15, 2023; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiff, filed February 6, 2024; Replying Affidavits and supporting papers by defendants, filed March 11, 2024; Other oral argument on August 20, 2024; it is

ORDERED that the motion by defendant Scott Capustin, M.D., for leave to reargue and renew his prior motion to dismiss the complaint against him on the grounds that he is immune from suit and liability under New York's Emergency or Disaster Treatment Protection Act ("EDTPA"), N.Y. Pub. Health Law §§ 3080-82, which was denied by order of this Court dated November 17, 2023, is granted to the extent as set forth herein and is otherwise denied; and it is further

ORDERED that, upon reargument, the motion by defendant Scott Capustin, M.D., to dismiss the complaint against him on the grounds that he is immune from suit and liability under New York's Emergency or Disaster Treatment Protection Act ("EDTPA"), N.Y. Pub. Health Law §§ 3080-82 is granted.

Rampmaier-Verdon v Genovesi
Index No. 611580/2021
Page 2

The branch of defendant's motion for leave to renew his prior motion for dismissal is denied. A motion for leave to renew must be based on new or additional facts "not offered on the prior motion that would change the prior determination," and "shall contain a reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e][2], [3]; see *Shacknow v Fischman*, 170 AD3d 771, 93 NYS3d 604 [2d Dept 2019]; *McHale v Metropolitan Life Ins. Co.*, 165 AD3d 914, 86 NYS3d 600 [2d Dept 2018]; *Candlewood Holdings, Inc. v Valle*, 134 AD3d 872, 23 NYS3d 266 [2d Dept 2015]). Renewal is "not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" or who failed to assert a legal theory due to a mistaken belief that what was submitted was sufficient (*Matter of Weinberg*, 132 AD2d 190, 210, 522 NYS2d 511 [1st Dept 1987], *lv dismissed* 71 NY2d 994, 529 NYS2d 277 [1988]; see also *Ascentium Capital, LLC v Empire Med. Servs. of Long Is., P.C.*, 182 AD3d 563, 120 NYS3d 824 [2d Dept 2020]; *Matter of O'Gorman v O'Gorman*, 122 AD3d 744, 995 NYS2d 230 [2d Dept 2014]). Here, defendant has failed to proffer new or additional facts which change the prior determination on the motion for dismissal.

However, defendant's submissions demonstrate that the Court misapplied a controlling principle of law in reaching its determination on the prior motion for dismissal on behalf of defendant Capustin (see CPLR 2221 [d]). Accordingly, the branch of defendant's motion for reargument is granted.

Plaintiff, as executor of the Estate of Joan Chapman, commenced this action on June 28, 2021 by the filing of a summons and complaint alleging damages, *inter alia*, for wrongful death, negligence and gross negligence on behalf of Joan Chapman, the decedent. Plaintiff alleges, among other things, that Dr. Capustin negligently cleared the patient for surgery on June 16, 2020 without performing a pulmonary function test; failed to convey the need to perform a pulmonary function test on May 21, 2020; failed to perform a pulmonary function test on June 16, 2020; and failed to perform a spirometry test. Joan Chapman presented to Dr. Capustin on February 20, 2020 with complaints of a lung nodule. She brought in a CT scan on a disc showing a nodule which was new from 2015. Dr. Capustin directed a repeat chest CT scan within 3 months with a follow-up appointment for review of the films in person. The patient underwent the CT scan on May 20, 2020 which showed interval growth on the right lower lobed nodule measuring 1.2 x 1 cm, consistent with a neoplasm. The patient presented by telehealth to Dr. Capustin on two occasions in May, 2020 rather than in person due to social distancing and the patient being high-risk for COVID-19. Chapman was then referred to Dr. Perwaiz for a lung biopsy. She was deemed a good candidate for cyberknife radiation therapy. A pulmonary function test was scheduled for June 18, 2020 but the patient never appeared for the test. She elected to proceed with lung resection surgery which took place on June 16, 2020, without discussing it with defendant Capustin. Plaintiff commenced this action on behalf of her mother and alleges that she sustained various injuries, including pneumonia, a food bolus in her esophagus, respiratory compromise, and eventually died from complications related to aspiration pneumonia on August 1, 2020.

Defendant Capustin moves to dismiss the complaint pursuant to CPLR §3211(a)(7), asserting that he is immune from liability for the causes of action alleged in the complaint under the Emergency or Disaster Treatment Protection Act (Public Health Law former Article 30-d [repealed by L.2021, ch. 96 §1] [the "EDTPA"]). In support of his application, Capustin submits, among other things, his own affidavit. There is no dispute that the decedent was a patient of defendant Capustin during the applicable

Rampmaier-Verdon v Genovesi
Index No. 611580/2021
Page 3

time period under the EDTPA. Plaintiff opposes the motion asserting that the repeal of the EDTPA is retroactive and thereby defendant is not immune from liability. Plaintiff also asserts that defendant's motion should be denied as premature and that if defendant was grossly negligent in his care and treatment of the decedent, he would not be allotted the blanket protection of the EDTPA.

In determining a motion to dismiss a complaint pursuant to CPLR §3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Matneja v Zito*, 163 AD3d 800, 801, 81 NYS3d 174 [2d Dept 2018]; see also *Rosenblum v Island Custom Stairs, Inc.*, 130 AD3d 803, 803, 14 NYS3d 82 [2d Dept 2015]; *Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Org.*, 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], quoting *Schneider v Hand*, 296 AD2d 454, 744 NYS2d 899 [2002]). The test of the sufficiency of a pleading is "whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*Hampshire Props. v BTA Bldg. & Developing, Inc.*, 122 AD3d 573, 573, 996 NYS2d 129 [2d Dept 2014], quoting *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; see also *JPMorgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010], quoting *Moore v Johnson*, 147 AD2d 621, 621, 538 NYS2d 28 [2d Dept 1989]). Thus, the inquiry is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" (*Muka v Greene County*, 101 AD2d 965, 965, 477 NYS2d 444 [4th Dept 1984]; see also *DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; *Melito v Interboro-Mutual Indem. Ins. Co.*, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]). Thus, "factual allegations which are flatly contradicted by the record are not presumed to be true, and '[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR §3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action'" (*Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 915, 891 NYS2d 445 [2d Dept 2009], quoting *Peter F. Gaito Architecture, LLC v Simone Dev Corp.*, 46 AD3d 530, 530, 846 NYS2d 368 [2d Dept 2007]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-42, 53 NYS3d 598 [2017]).

As the Second Department recently ruled, under the EDTPA medical personnel and health care facilities are immune from

any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services as long as three conditions were met: the services were arranged for and provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law; the act or omission was impacted by decisions or activities that were in response to or as a result of the

Rampmaier-Verdon v Genovesi
Index No. 611580/2021
Page 4

COVID-19 outbreak and in support of the State's directives; and the services were arranged or provided in good faith. The health care services covered by the immunity provision included those related to the diagnosis, prevention, or treatment of COVID-19; the assessment or care of an individual with a confirmed or suspected case of COVID-19; and the care of any other individual presented at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration.

(*Mera v New York City Health & Hosps. Corp.*, 220 AD3d 668, 669, 197 NYS3d 278 [2d Dept 2023])[internal quotations and citations omitted]; *see also* *Martinez v NYC Health & Hospitals Corp.*, 223 AD3d 731, 203 NYS3d 653 [2d Dept 2024]). Contrary to plaintiff's contention, the repeal of the EDTPA did not apply retroactively (*Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 AD3d 618, 213 NYS3d 133 [2d Dept 2024]).

The affidavit of defendant Capustin, submitted in support of his motion to dismiss, established that he was entitled to immunity under the EDTPA. Plaintiff has otherwise failed to demonstrate that the negligence claims are not a result of, or impacted by, the COVID-19 pandemic. Furthermore, plaintiff's purported allegations of gross negligence are insufficient, as the complaint "fails to distinguish conduct which is claimed to constitute gross negligence from that which is merely ordinary negligence and does not contain any specific factual allegation in support of any claim of intentional and/or reckless conduct" (*Estate of Alechko v Sprain Brook Manor Rehab*, 81 Misc3d 1242, 203 NYS3d 865 [Sup Ct., Westchester County 2024]; see also *Kalogiannis v New York Ctr. for Rehabilitation & Nursing*, 80 Misc3d 1219, 196 NYS3d 918 [Sup Ct. Queens County 2023])[complaint "failed to plead specific allegations that rise to the level of gross negligence, which differ in kind, not only degree, from claims of ordinary negligence"]; *Cameron v Cobble Hill Health Center, Inc.*, 2024 WL 198419, 2024 NY Slip Op. 30249(U) [Sup Ct. Kings County 2024]).

Inasmuch as defendant is immune from liability under the EDTPA for the allegations in the complaint and the allegations of gross negligence are conclusory and lack specificity such that the exception to the EDTPA for gross negligence has not been met, defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a)(7) is granted.

The foregoing constitutes the decision and Order of the Court.

Dated:

d: January 8, 2025


A.J.S.C.

FINAL DISPOSITION X NON-FINAL DISPOSITION

Rampmaier-Verdon v Genovesi
Index No. 611580/2021
Page 5

TO:
MARTIN CLEARWATER & BELL, LLP
Attorneys for Defendant Charles Bleacher, M.D.
90 Merrick Avenue, Suite 401
East Meadow, New York 11554

BARBIERO, BISCH & O'CONNOR, & COMMANDER, LLP
Attorneys for Defendant Mark Genovesi, M.D.
35 Pinelawn Road, Suite 127
Melville, New York 11747